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Supreme Court No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

BAXTER LOVE,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Court of Appeals
No. 71-1986

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, entered May 24, 1972, and judgment in accordance with that Opinion, hereinafter set forth (Appendix A, *infra,* pp 8-9), is not yet officially reported.

2. JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered on May 24, 1972. The jurisdiction of the Court is invoked under Title 28 USC §1254 (1).

3. QUESTION PRESENTED

The question presented by this petition is:

Whether, in a prosecution for knowingly making a false statement in connection with the purchase of a firearm, the absence of any proof whatever of knowing misstatement other than the signing of a vague and confusing certification form since withdrawn by the government, and the failure of the trial judge to instruct the jury to consider the adequacy of notice given by the certification form used require reversal of petitioner's conviction as violative of due process of law.

4. STATUTORY AND CONSTITUTION PROVISIONS INVOLVED

The following statutory and constitutional provisions involved herein are set forth in Appendix B, *infra,* p 9.

5. STATEMENT OF THE CASE

On June 24, 1971, Petitioner Baxter Love was convicted of knowingly making a false statement in connection with the purchase of a firearm, contrary to the provisions of 18 USC §922(a)(6).

On May 2, 1970, Petitioner Baxter Love purchased a paratrooper carbine from Neumann's Gun Shop in the City of Detroit, Michigan. Mr. Love is a resident of the City of Detroit who had been convicted of attempted larceny from a person, a felony, in the Detroit Recorder's Court prior to this transaction.

At the gun shop, Mr. Love was waited on by Mrs. Pearl McBride, an employee at the shop who had been working there for approximately eight months at the time of this transaction and for twenty-one months at the time of the trial. Mrs. McBride testified that as a result of her experience in working there she knew from memory and without hesitation the contents of the form [Form 4473] filled out by transferor (partially) and by transferee (partially) in a firearm transaction within the coverage of the federal statutory scheme.

Mrs. McBride verified Mr. Love's identification by looking at his Michigan Driver's License and then filled out her portion of the Form 4473 with petitioner's name, address, height, weight, race, date of birth, place of birth, the name, model and serial number of the weapon and her own name, title and the date. She testified that after this task had been completed she handed the form to Mr. Love and asked him "to read the statements and then sign it please".

When asked the contents of the statement to be signed by the purchaser, Mrs. McBride testified that it states that the purchaser is not under indictment and has never been "indicted" for any sentence that would bring more than one year in prison and that the purchaser has never been in a mental institution; further, that the purchaser is not a drug addict or an alien, has not renounced his or her citizenship and has not been dishonorably discharged from the armed forces. Mrs. McBride testified that she didn't think the form said anything about being a convicted felon.

She testified that prior to signing the statement, petitioner appeared to read it, taking a couple of minutes to do so. She did not explain the statement to petitioner, nor does she know whether he understood it. There was no testimony that she ever attempted to determine whether or not he was able to understand the statement on the version of the form he was signing.

After the transaction, Mr. Love paid for the weapon and left the store.

Approximately one month later, the form utilized in this transaction was withdrawn by the government and substituted with a [third] version which requires the purchaser to answer — by making check marks — individual questions. (See Appendix C, *infra*, pp 10-14).

Some time later petitioner was indicted for violation of 18 USC, 922 (a)(6) which prohibits knowingly making a false statement in connection with the acquisition of a firearm. After a trial by jury petitioner was convicted of this offense and on the 21st day of October, 1971, he was sentenced to one year's imprisonment.

At the conclusion of petitioner's trial, the trial judge, in her instructions to the jury, failed to instruct the jury to consider the adequacy of notice (of the provisions of the statute) given by the certification statement contained in the version of Form 4473 presented to petitioner.

6. REASONS FOR GRANTING THE WRIT

This case raises an important question of federal constitutional law concerning the sufficiency of notice given by the Form 4473 used to justify petitioner's conviction in this case, which question should be settled by this Court.

Petitioner Baxter Love was convicted of knowingly making a false statement in connection with the purchase of a firearm, contrary to the provisions of 18 USC §922 (a)(6). In order to meet its burden of proving that petitioner "was 'aware of a high probability' that he was prohibited by the cited statutes from receiving a firearm in interstate commerce," *United States* v *Squires,* 440 F2d 859, 864 (2d Cir 1971), the government introduced the Form 4473 signed by petitioner during the course of the transaction for the purchase of the firearm. (See Appendix C, *infra,* pp 10-14).

Beyond the signature on the form and the testimony of the clerk who attended to petitioner that "he appeared to read" it, the government introduced no evidence that petitioner understood, or was able to understand the language of the since-discontinued version of Form 4473.

In her charge to the jury, the trial judge failed to instruct the jurors to consider the adequacy of notice given by the certification form used.

Central to an understanding of this case is a comprehension of the fact that what may be clear to a lawyer is often not at all clear to a lay person. Indeed, the very language used by attorneys to achieve clarity often serves only to confuse lay persons. Moreover, the confusing nature of the form used in this transaction is highlighted by the changes in the subsequent version.

Mrs. McBride, the clerk who attended to petitioner, had worked in Neumann's Gun Shop for approximately eight months at the time of the transaction involved here. She

had worked there for twenty-one months at the time of trial. She had filled out many forms 4473 and claimed to be able to recite its provisions without hesitation. Nevertheless, at trial she quoted the certification as saying, "[I am] not under indictment and have never been *indicted* for any sentence that would bring more than one year in prison . . ." When asked specifically whether the form said anything about being a convicted felon, she said she didn't think it did. When she was asked to point out where "those statements" — the ones to which she had testified — appeared, she pointed to the place on the form to where they allegedly were to be found.

Mrs. McBride was, of course, substantially mistaken as to what she was reading and what she had read previously many times. The form *does* refer to *conviction* of a crime punishable by imprisonment for a term exceeding one year, yet even one as familiar with the form as she was unable to understand this. It is even less likely that one reading the form for the first time would understand its terms.

It is also unreasonable to expect a lay person to assume without explanation that the form, by saying *a* crime, actually means *any* crime, *state* or *federal*. A person filling out a federal form including references only to federal statutes and federal agencies will not necessarily assume — and reasonably so — that reference to *a* crime includes *any* crime, including state offenses. In this regard it should be noted that the most recent version has partially clarified this by referring to "any crime" and by dividing the indictment and conviction questions into two separate questions. (See Appendix C, *infra*, pp 10-14).

Moreover, the form refers to *indictment*, the form of initiation of prosecution used in federal courts. A person with a state criminal record, if from an *information/examination* state and knowledgeable in these matters, may reasonably assume that *indictment* refers only to federal offenses, and that disclosure of state court convictions is therefore not required.

Petitioner Love was convicted in a state court in Michigan, a State in which criminal prosecutions are almost universally initiated by information and examination. It

is unreasonable to assume that, without any explanation whatever, he was necessarily able to understand this prohibition as applying to him.[1]

Mrs. McBride, a clerk experienced with Form 4473, did not understand its requirements. She does not know whether Baxter Love understood then or was able to understand them at the time he signed the certification. She did not attempt to explain them to him, merely handing him the form and asking him to read and sign it. The government did not offer any additional evidence that petitioner understood the contents of the certification he signed. And the government seeks to rely, in proving its case, on a poorly worded, subsequently withdrawn form which is misunderstood by persons having read and worked with it many times.

The version of Form 4473 in this transaction was withdrawn by the government in June, 1970. It was replaced with a version which requires the purchaser to answer with a "yes" or "no" answer individual questions relating to the statutory prohibitions. It adds the following notice to the certification section: "I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with

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[1] It should also be noted that the government in this form asks one to certify that they are "not an unlawful user of, or *addicted* to *marihuana* or a depressant, stimulant or narcotic drug". This language is very sloppy and misleading, and it is not unreasonable that one familiar with the true properties of drugs would conclude that the government is not requesting much exactitude in its disclosure certification. It is medically impossible to be "addicted to marihuana," a fact long-known by medical authorities and now generally conceded by law enforcement personnel as well; it is also medically impossible to become addicted to a stimulant; and any narcotic drug is necessarily a depressant. Cf. Goodman, L.S., and Gilman, A., The Pharmacological basis of Therapeutics, 3d ed. (McMillan Co., New York 1970).

respect to this transaction is a crime punishable as a felony."

The form used in this transaction included no such warning provision in the certification. The only notice given by such form was at the very top of the form, and that notice in no way warned a potential illegal transferee of his or her disability. That notice consisted of the following warning: "Under 18 U.S.C. Chapter 44 . . . (other cites omitted), firearms may not be sold to or received by certain persons. The following information and certification are designed so that a person licensed under Chapter 44 may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) if certain restrictions on the receipt and possession of firearms."

On the basis of his signature alone on that form, there can be no showing that Baxter Love "was 'aware of a high probability' that he was prohibited by the cited statutes from receiving a firearm in interstate commerce," *United States* v *Squires, supra,* at 864. Consequently, his conviction may not stand consistent with due process. *Id.* See also *Lanzetta* v *New Jersey,* 806 US 451, 59 S Ct 618, 83 L Ed 888 (1939).

The failure of the trial judge to instruct the jury to consider the adequacy of notice given by this form compounded the error.

7. CONCLUSION

For the reasons stated above, petitioner prays that this Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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Of Counsel:

(s) Kenneth M. Mogill
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APPENDIX A

No. 71-1986

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	APPEAL from the
v.	)	United States District
BAXTER LOVE, *Defendant-Appellant.*	)	Court for the Eastern District of Michigan.

Decided and Filed May 24, 1972.

Before: EDWARDS and MILLER, Circuit Judges, and ENGEL,* District Judge.

PER CURIAM. This is a direct appeal from appellant's conviction after jury trial in the United States District Court for the Eastern District of Michigan of violating 18 U.S.C. § 922 (a)(6) (1970) by knowingly having made a false statement in connection with the purchase of a firearm.

The government's case consisted of proving that appellant signed a form called "Firearms Transaction Record" by which he certified 1) "I am neither under indictment for, nor have I been convicted of, a crime punishable by imprisonment for a term exceeding one year." In fact, as

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* Hon. Albert J. Engel, District Judge for the Western District of Michigan, sitting by designation.

was stipulated at trial, appellant had been convicted in Detroit Recorder's Court in 1964 of unlawfully driving away an automobile, which offense was a felony under the laws of the State of Michigan and punishable by imprisonment in excess of one year.

The District Judge's charge to the jury on the issues of knowledge and intent was careful, thorough and neither party expressed any objection thereto.

The only issue on appeal is appellant's contention that the form itself is so defective as to fail to put the purchaser on notice. While the transaction record employed in this case is not as clear or as explicit as could be desired (or has now been devised), we do not find it fatally defective. *See United States* v *Ledbetter*, 432 F.2d 1223 (10th Cir. 1970); *United States* v *Rosenstengel*, 323 F. Supp. 499 (D.C. Mo. 1971).

The judgment of the District Court is affirmed.

APPENDIX B

United States Code Title 18, §922 (a)(6):

"It shall be unlawful — for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter [§§921-928 of this title].

APPENDIX C

Form 4473 (Rev. June 1969) (2d version):

FIREARMS TRANSACTION RECORD
Intra-State Over-the-Counter

Department of the Treasury, Internal Revenue Service, Alcohol, Tobacco and Firearms Division

Transferor transaction number — 0350-4

Notice:

Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351. 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The following information and certification are designed so that a person licensed under Chapter 44 may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms.

Section A—Statement of Transferee or Buyer

1. Transferee's (buyer's) name (last, first, middle) (Mr.) (s) Love, Baxter
2. Height 6-0.
3. Weight 165.
4. Race N.
5. Address 1236 20th St., Det., Mich.
6. Date of birth 6-8-46.
7. Place of birth Ala.

I certify that: (1) I am neither under indictment for, nor have I been convicted of, a crime punishable by imprisonment for a term exceeding one year; (2) I am not a fugitive

from justice; (3) I am not an unlawful user of, or addicted to marihuana or a depressant, stimulant or narcotic drug; (4) I have not been adjudicated mentally defective and I have never been committed to a mental institution; |5) I have not been discharged from the Armed Forces under dishonorable conditions; (6) I am not an alien illegally in the United States; and (7) I am not a person who, having been a citizen of the United States, has renounced his citizenship.

Transferee's (buyer's) signature (s) Baxter Love

Date 5-2-70.

Section B—Statement of Transferor or Seller

The person described in Section A, has identified himself to me in the following manner:

8. Type of identification (driver's license, etc.) Black S Coupe De Ville. Car License No. KMH145.

9. Number or identification L100/081/024/430.

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, or otherwise dispose of the firearm described below to the person identified in Section A.

10. Type (pistol, rifle, etc.) Carbine.
11. Model Paratrooper.
12. Caliber or gauge 30M1.
13. Serial number 21677.
14. Manufacturer (and importer, if any) Plainfield.
15. Transferor's (seller's) signature P. McBride
16. Transferor's title Clk.
17. Transaction date 5-2-70.

EXHIBIT NO. 2B

Form 4473 (Rev. June 1970) (3d version):

FIREARMS TRANSACTION RECORD
Intra-State Over-the-Counter

Note: Please read and carefully follow the instructions on the back

Department of the Treasury, Internal Revenue Service, Alcohol, Tobacco and Firearms Division

Transferor transaction number .....

Section A—Statement of Transferee or Buyer

1. **Transferee's (buyer's) name (last, first, middle) (Mr., Mrs., Miss)**
2. **Height**
3. **Weight**
4. **Race**
5. **Address (number, street, city, State, ZIP code)**
6. **Date of birth**
7. **Place of birth**
8. **Certification of Transferee (Buyer)—an untruthful answer may subject you to criminal prosecution. Each question must be answered with a yes or no.**

   a. Are you under indictment in any court for a crime punishable by imprisonment for a term exceeding one year? .....

   b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year.) .....

c. Are you a fugitive from justice? .....

d. Are you an unlawful user of, or addicted to, marihuana or a depressant, stimulant, or narcotic drug? .....

e. Have you been adjudicated mentally defective or have you ever been committed to a mental institution? .....

f. Have you been discharged from the Armed Forces under dishonorable conditions? .....

g. Are you an alien illegally in the United States? .....

h. Are you a person who, having been a citizen of the United States, has renounced his citizenship? .....

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Transferee's (buyers signature)

_____ Date .....

Section B—Statement of Transferor or Seller

The person described in Section A, is known to me [ ], or has identified himself to me [ ] in the following manner:

9. Type of identification (driver's license, etc.) .....

10. Number on identification .....

On the basis of: (1) the statements in Section A; (2) the verification of identify noted in Section B; and (3) the information in the current list of Published Ordinances, it is

my belief that it is not unlawful for me to sell, deliver, or otherwise dispose of the firearm described below to the person identified in Section A.

11. Type (pistol, rifle, etc.) .....
12. Model .....
13. Caliber or gauge .....
14. Serial Number .....
15. Manufacturer (and importer, if any) .....
16. Transferor's (seller's) signature .....
17. Transferor's title .....
18. Transaction date .....

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1667

BAXTER LOVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of Michigan of knowingly making a false statement in violation of 18 U.S.C. 922(a)(6) and was sentenced to imprisonment for one year. The court of appeals affirmed.

The evidence at trial showed that petitioner purchased a paratrooper carbine from a licensed gun dealer on May 2, 1970. The clerk who waited on petitioner testified that, after she had filled out her

portion of the prescribed Form 4473 then in effect (Pet. App. C), she gave the form to petitioner to read and sign. Petitioner appeared to read it for several minutes and then signed it (Tr. 30-33, 49-51, 53). The form contains a statement by which the purchaser certifies *inter alia* that "I am neither under indictment for, nor have I been convicted of, a crime punishable by imprisonment for a term exceeding one year" (Pet. App. 10). Petitioner had in fact been convicted in Detroit Recorder's Court of attempted larceny from the person, a felony punishable by imprisonment for a term exceeding one year (Tr. 116).

Petitioner brought out before the jury the fact that Form 4473 had been revised a month after petitioner made his purchase (Tr. 117-121).[1] The judge charged the jury that, to convict, it had to find that defendant knowingly made a false statement and explained that knowingly meant that the act had to be done intentionally and not because of mistake or accident (Tr. 146-147).

Petitioner argues that Form 4473, at the time he signed it, was so unclear that the jury could not properly have found that he knowingly made a false statement. As the court below pointed out, while

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[1] The new form appears at Pet, App. 12-13. It explicitly states that one who gives an affirmative answer to the questions listed is prohibited from purchasing a firearm and that a false answer would subject the signer to prosecution. It also explicitly states with respect to prior convictions that the actual sentence given by the judge is immaterial so long as the crime potentially carried a penalty of more than one year.

the form could be clearer and has been clarified, it was sufficient to support the jury's finding that petitioner was well aware that he was making a false certification.

It is therefore submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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